United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

'Notice: This is an electronic bench opinion which has not been verified as official'
Date: August 25, 1997

Case No. 95 INA 0659

In the Matter of:

ULTRA CREATIVE CORPORATION,
Employer

on behalf of

MAREK JANKOWSKI,
Alien

Appearance: P. W. Janaszek of New York, New York, Agent

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of MAREK JANKOWSKI (Alien) by ULTRA CREATIVE CORPORATION (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

On March 1, 1994, the Employer, which is a manufacturer and printer of packaging materials in Brooklyn, New York, applied for labor certi-fication on behalf of the Alien for the position of Parts Salva-ger, Printing Machines. AF 07. Employer offered $13.00 an hour as wages for this forty hour a week position, making no provision for overtime work. The educational requirement for the job was high school graduation, and the experience required was two years's work in the job offered. AF 07.

Notice of Findings. On March 17, 1995, The Certifying Officer (CO) issued a Notice of Findings (NOF) denying labor certification, subject to rebuttal. AF 35. Noting that three other applications for parts salvager had been granted upon applications by this Employer, the CO questioned whether this additional job included duties which would be performed on a daily basis within a permanent and full-time schedule. The CO listed information which the Employer was directed to file in its rebuttal to establish the existence of permanent, full time employment in the position described.

Rebuttal. Employer's rebuttal of April 14, 1994, included a list of the printing machines used in its business, a list of bills for replacement parts and service on the older machines, a list of newly purchased machines, and the Employer's income tax returns for 1993 and 1994. Employer represented that the infor-mation it submitted would establish the need for two additional parts salvagers to perform these job duties on a daily basis in order for Employer's business to use the machines that require repair, maintenance, and preventive maintenance. AF 214.

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

Final Determination. On April 28, 1995, the CO denied certification in a Final Determination based on the evidence of record. The CO observed that the bills established activity in the position duties, but found that there was not sufficient information submitted on rebuttal to establish that the job duties proposed furnished enough work to warrant the creation of two additional full time positions in addition to the four jobs already approved to perform this type of work for its business. The CO said the amount spent on repairs the rebuttal evidence documented was minimal when compared to the total dollar volume of business in which it was engaged during this time period. Employer failed to prove that the services of the job offer were required on a continuous basis, given the number of its employees who already were available to perform this work, however. AF 217.

Appeal. The Employer requested review on May 26, 1995, stating that the rebuttal evidence established that its volume of sales is increasing and that in this way it had demonstrated its need for additional workers. The Employer also said the reason it could not provide the proof of its salvaging activities that the CO required because this category of work is not performed for customers, but carried on in-house to maintain the printing machines with which the Employer produces its printed products. Finally, the Employer characterized as speculative the CO's finding that the company lacked sufficient business volume to hire the added alien workers, including the Alien in this application. AF-221.

DISCUSSION

The definitions in 20 CFR § 656.3 provide that "employment" means permanent full time work by an employee for an employer other than oneself. The employer bears the burden of proving that a position is permanent and full time. If an employer's evidence does not show that a position is permanent and full time, certification may be denied. **Gerata Systems America, Inc.**, 88-INA-344 (Dec. 16, 1988).

In the NOF, the CO directed the Employer to file information demonstrating that this position was permanent and full time, noting that the Employer had three other employees performing the same job duties. The Employer submitted evidence to establish that its business was engaged in the activity described in its application. The CO found these documents did not establish the need for two additional employees to perform the job duties, however. As the CO explained, the bills for parts and maintenance that Employer filed on rebuttal established that the repair and maintenance work was a minimal part of the company's total business. While the Employer asserted that added machines had been purchased and that its expansion of the printing

business required the additional parts salvagers, the Employer did not submit supporting documentary evidence, such as receipts for the added machines it recently purchased or other proof of the recent expansion of its business.

After weighing of the evidence of record, the CO properly found that Employer had failed to establish that it was offering a position of for permanent full time employment. The CO's denial cannot be found to have been based on speculation under all of the circumstances of this case when it is considered that three full time employees are already performing job duties that at best account for a minimal part of the Employer's annual budget. This inference is particularly justified where, as in this case, the Employer failed to submit the requested evidence to support the addition of two more full time employees to perform the same job duties, one of which is the Alien. Rather, it is apparent that the CO's finding that Employer failed to establish that the position offered permanent full time employment was based on the evidnece of record and on the Employer's failure to provide the required documentary evidence.

Consequently, it is concluded that the CO properly found the Employer failed to establish the existence of permanent, full time employment, as required by 20 CFR § 656.3, and for this reason the CO correctly denied this application for alien labor certification under the Act and regulations.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case No. 95 INA 0659

ULTRA CREATIVE CORPORATION, Employer
MAREK JANKOWSKI, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: August 18, 1997